

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DOUGLAS LAMAR</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,894
<b>STONE MASON'S, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>NORTHWESTERN NATIONAL CASUALTY</b>	)	
Insurance Carrier	)	

**ORDER**

On April 3, 1997, the application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish dated October 11, 1996, came on for oral argument.

**APPEARANCES**

Claimant appeared by and through his attorney, W. Walter Craig of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, James A. Cline of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

**ISSUES**

- (1) Whether claimant suffered accidental injury on the date alleged.
- (2) Whether claimant's accidental injury arose out of and in the course of his employment.
- (3) The nature and extent of claimant's injury and/or disability.

(Claimant originally contested the 12 percent lower extremity functional impairment rating, arguing that the medical expert converted this lower extremity impairment to a 4 percent whole body impairment. Claimant's attorney, at oral argument, acknowledged claimant would be entitled, under the Workers Compensation Act, to a functional impairment for the injury done to claimant's right foot only.)

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury on September 23, 1995, when the forks on a forklift fell striking his right foot. Claimant alleged the accident occurred at approximately 9:30 a.m. Claimant continued working for respondent until sometime shortly after noon when he was terminated by respondent/owner John Born. At approximately 4:45 p.m. claimant went to the emergency room of the local hospital. There his foot was examined and it was determined that claimant had suffered a fracture of the second and third metatarsals. Claimant was examined and treated by Michael P. Estivo, D.O., and ultimately released to return to work.

Claimant's contention that he suffered accidental injury on the job is strongly disputed by the representatives of respondent. Mr. Greg Marler, claimant's foreman, denied claimant's contention that the forks struck his foot. Mr. Marler testified that he observed claimant banging on the forks with a sledge hammer, trying to remove them, and when they fell, claimant jumped back but gave no indication that he was injured. When Mr. Marler inquired on two separate occasions as to whether claimant was hurt, claimant denied any injury. Mr. Marler also opined that it would be impossible for claimant to have continued working for the remaining three hours of his shortened work day with a broken foot, considering claimant gave absolutely no indication that he had suffered any type of injury.

Claimant's testimony was also contradicted by Mr. John Born the president of Stone Mason's. Mr. Born indicated claimant worked for him for approximately three weeks. Of the three weeks, only during the first week was claimant actually on the job. Claimant was

off work for personal reasons for the next two weeks. When claimant tried to return to work Mr. Born discussed the possibility of terminating claimant's employment. The alleged date of accident was claimant's first day back after this extended two-week absence.

Mr. Born also contested claimant's contention that he was injured on the job. Mr. Born testified that claimant gave no indication that he had suffered any type of injury when he discharged claimant at approximately 12:30 p.m. Claimant had been working on a 30-foot scaffold which he felt claimant would be unable to climb with a broken foot.

Claimant's allegations of an injury are also questioned by Victoria K. Sanchez, a nurse working in the emergency room of Riverside Health Hospital in Wichita, Kansas, on the afternoon when claimant first appeared. She noted discrepancies in claimant's description of the injury. Originally claimant indicated he had injured his foot at home when he struck himself with a sledge hammer, approximately three hours before his admission into the hospital. Claimant contests this testimony indicating he does not even own a sledge hammer. Thus, his striking himself with a sledge hammer at home would be impossible. Ms. Sanchez also indicated that claimant did not allege this to be a work-related accident until he was advised that the injury was more serious than originally thought. At that time claimant indicated he wanted to file this as a workers compensation claim.

The Workers Compensation Act makes it claimant's burden to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

To a significant degree this matter hinges upon whether claimant or Mr. Born, Mr. Marler, and Nurse Sanchez are seen as the most credible. The Appeals Board, in reviewing the evidence, finds that the testimony of the claimant is contradicted on numerous fronts and the claimant's version of the story is not supported by a preponderance of the credible evidence. As such the Appeals Board finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent on the date alleged and all benefits should be denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated October 11, 1996, should be, and is hereby, reversed and an award is denied claimant, Douglas Lamar, against Stone Mason's, Inc. and Northwestern National Casualty for the alleged injury of September 23, 1995.

Fees necessary to defray the costs of the administration of the Workers Compensation Act are assessed against the claimant to be paid as follows:

Ireland Court Reporting	
Transcript of preliminary hearing	\$211.49
Deposition Services	
Transcript of preliminary hearing	\$ 84.70
Alexander Reporting Co.	
Deposition of Steven James Howell, M.D.	\$172.65
Barber & Associates	
Transcript of regular hearing	\$124.10
Bannon & Associates	
Deposition of Victoria K. Sanchez	\$145.70

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1997.

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BOARD MEMBER

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BOARD MEMBER

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c:   W. Walter Craig, Wichita, KS  
      James A. Cline, Wichita, KS  
      Jon L. Frobish, Administrative Law Judge  
      Philip S. Harness, Director